

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

AUG 27 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Promotion of Competitive Networks)
in Local Telecommunications Markets)
)
Wireless Communications Association)
International, Inc. Petition for)
Rulemaking to Amend Section 1.4000)
of the Commission's Rules to Preempt)
Restrictions on Subscriber Premises)
Reception or Transmission Antennas)
Designed To Provide Fixed Wireless)
Services)
)
Cellular Telecommunications Industry)
Association Petition for Rule Making and)
Amendment of the Commission's Rules)
to Preempt State and Local Imposition)
of Discriminatory and/or Excessive)
Taxes and Assessments)
)
Implementation of the Local)
Competition Provisions in the)
Telecommunications Act of 1996)

WT Docket No. 99-217

CC Docket No. 96-98

To: The Commission

COMMENTS

Equitable access by telecommunications service providers to a multiple tenant property ("MTP") is an essential ingredient in developing the "pro-competitive, de-regulatory national policy framework"¹ Congress sought when it passed the Telecommunications Act of 1996

¹S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 1 (1996) ("1996 Conference Report").

("1996 Act").² Such access, however, is problematic because regulations and policies promoting competitive MTP access have yet to be adopted.

Addressing the need for an appropriate regulatory framework is critical as the MTP marketplace for competitive telecommunications services is growing rapidly. Any delay in establishing requirements for access by telecommunications providers to MTPs "could seriously detract from local competition in general and from the availability of competitive services" to all potential users, including the residential and commercial tenants of these properties.³

In the captioned Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 ("NPRM"), the Commission attempts to facilitate implementation of these goals. It proposes rules and solicits information intended to create an environment where competitive local exchange carriers ("CLECs") and other telecommunications service providers would have reasonable and non-discriminatory access to MTP rights-of-way, buildings, rooftops and other essential facilities.⁴

Dallas Wireless Broadband, L.P., dba CoServ Broadband ("CoServ Broadband") typifies the telecommunications entrepreneur that the proposals set forth in the NPRM are intended

²Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. (1999). The 1996 Act amended the Communications Act of 1934, as amended (the "Act"). The pro-competitive regulatory "framework" established in the 1996 Act is intended to "accelerate rapidly private sector deployment of advanced telecommunications information and services. . . ." 1996 Conference Report at 1.

³Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2450-51 (1999).

⁴NPRM at ¶ 19.

to promote. As described below, CoServ Broadband clearly is at the cutting edge of this growing market. Thus, pursuant to Section 1.415 of the Commission's Rules,⁵ CoServ Broadband, by its attorneys, hereby comments on the NPRM.⁶

CoServ Broadband is affiliated with CoServ Communications, L.L.C., which directly and through other affiliates is involved in the provision of myriad telecommunications and utilities services. These services include cable television, telephone, security, wireless data, and Internet access. One of CoServ Broadband's affiliates is the first B-licensee providing commercial LMDS service in the Dallas, Texas BTA. Moreover, CoServ Broadband and its affiliates currently project having approximately 30,000 lines providing telecommunications and video services to single family residences, MTPs, and commercial locations by the end of 1999.

Specifically, the Commission's new rules would increase access to MTP facilities controlled or owned by utilities, including local exchange carriers ("LECs"), and to the facilities controlled or owned by the landlords of the property involved. Adoption of appropriate rules governing MTP access would generate several benefits. Barriers to entry would be reduced -- competitive providers could deliver service without significant economic investment in MTP infrastructure. Opportunities for penetrating the MTP market would improve -- availability of unbundled network elements ("UNEs") and other facilities would increase. Most importantly,

⁵47 C.F.R. § 1.415 (1999).

⁶The deadline for filing comments on the NPRM was extended until August 27, 1999. Order Extending Pleading Cycle, WT Dkt. No. 99-217, DA 99-1563 (Chief, Commercial Wireless Division, rel. Aug. 9, 1999).

"competitive networks [would] develop [because] the incumbent LECs' bottleneck control over interconnection [would] dissipate" ⁷

In sum, CoServ Broadband supports:

- ◆ Making UNE's available to all providers of telecommunications services in MTPs at reasonable prices and on competitive terms and conditions.
- ◆ Requiring MTP owners to enter into only non-exclusive Right-Of-Entry ("ROE") contracts with telecommunications providers.
- ◆ Establishing a uniform standard for where the demarcation point between facilities controlled by the LEC and facilities controlled by the MTP owner is located and for how it is made accessible by competitive providers.

PROVISION OF COMPETITIVE TELECOMMUNICATIONS SERVICES TO MTPs IS AN EMERGING MARKET

Passage of the 1996 Act, adoption of pro-competitive federal, state and local requirements for provision of telecommunications services, and constant technological change, all have created an opportunistic environment for CoServ Broadband and other telecommunications providers. The rules proposed in the NPRM should facilitate taking this evolving market to the next level.

Availability of telecommunications and other information services to MTP occupants at competitive terms is increasing rapidly. Numerous companies, including CoServ Broadband, are negotiating ROE agreements with MTP owners, installing or upgrading on-premises facilities, executing agreements with other service providers to resell their services, and packaging all these services, at competitive prices, to MTP occupants.

⁷NPRM at ¶ 22.

Both tenants and building owners benefit from such competition. Tenants receive state-of-the-art information and entertainment services. Costs for such services are reduced. Carrier responsiveness is increased. Similarly, building owners are helped. Having such services available enhances the building for existing or potential tenants. Improvements built on the MTP for such services, and related ongoing expenses, typically are paid by the carrier. Royalty revenues from tenant subscribers could be earned by the MTP owner.

Unfortunately, rules and policies promoting this competitive environment have yet to be extended to services provided at MTPs. The Commission thus is wisely using this NPRM to develop "a more complete and factual record regarding the current building access situation. . . ."⁸ CoServ Broadband, as detailed above, is well-positioned to help develop this record.

UNNECESSARY BARRIERS TO ENTRY MUST BE ELIMINATED

Access to MTPs is improving. Such access, however, still is oftentimes thwarted by barriers imposed by incumbent LECs, other carriers, and building owners. As the Commission correctly acknowledges in the NPRM, "building owners and incumbent LECs have obstructed competing telecommunications carriers from obtaining access on reasonable and nondiscriminatory terms to necessary facilities located within multiple unit premises."⁹

These barriers include imposition of usage or access fees that are not based on cost factors, engineering obstacles, exclusive contracts, and inconsistent provisions regarding access to the demarcation point facilities.¹⁰ Elimination of these barriers, as the Commission

⁸Id. at ¶ 31 n.67.

⁹Id. at ¶ 31.

¹⁰Id.

declares and as CoServ Broadband advocates herein, clearly is in the public interest and must be pursued aggressively.

**A LEC'S OBLIGATIONS TO MAKE UNEs AVAILABLE
MUST BE EXPANDED AND CLARIFIED**

The Commission, in the NPRM, addresses the incumbent LEC's statutory obligations with respect to providing UNEs. Pursuant to Section 251(c)(3) of the Act, incumbent LECs must make available, to any requesting carrier, nondiscriminatory access to network elements on an unbundled basis.¹¹ To date, with respect to services in the MTP environment, this requirement only has been imposed for unbundled access to the Network Interface Device.¹² However, unbundled access to MTP sub-loop facilities (i.e., inside wiring) still has not been mandated.¹³

The Commission, in the NPRM, appropriately addresses this "gap." It seeks comment on "the potential treatment of in-building cable and wiring owned or controlled by the incumbent LEC as an unbundled network element. . . ."¹⁴

Mandating open and cost-based access to UNEs is a critical element in establishing a competitive environment for providing telecommunications services to MTPs. Development of this environment, however, requires a careful analysis by the Commission of the MTP telecommunications infrastructure, including the cost and availability of UNEs within that local network.

¹¹47 U.S.C. § 251(c)(3) (1999).

¹²NPRM at ¶ 49.

¹³Id.

¹⁴Id. at ¶ 51.

A. UNEs Must Be Cost Based.

Special consideration must be given to how UNEs can be used to provide competitive telecommunications services in an MTP. For example, the sub-loop from a demarcation point into each tenant's premises is much shorter than the LEC's loop from its central office to the demarcation point. However, the costs for installing the loop are proportionately much lower than for the shorter sub-loop because the inside wiring must be installed in each MTP unit.

It is critical that this difference is recognized when the LEC's UNEs are made available to competitive providers. In addition, to the extent that a competitive provider makes its own UNEs available, the parties must incorporate these relative cost considerations into their negotiations.

B. Ownership Of Inside Wiring Must Be Clarified.

In the NPRM, the Commission seeks comment on how it can establish rules and policies that would ensure access to UNEs in the MTP is not "impaired."¹⁵ Clarifying ownership of inside wiring will help.

To enhance competitive access to MTPs, it is in the public interest for the building owner, rather than the LEC, to be considered the owner of the inside wiring. Without such ownership rights, the incumbent LEC would be less likely or able to control access in a discriminatory or anti-competitive manner. Any potential for impairing access to these UNEs would be minimized significantly.

Typically, inside wiring and other UNEs in a MTP are considered the building owner's property. Deeds of trust and other similar instruments include these assets as security for building owner financing.

¹⁵Id.

Unfortunately, despite this practice of collateralizing inside wiring, questions still exist regarding proper allocation of ownership rights to such facilities. Given this uncertainty, it is important for the Commission, in the context of this rulemaking, to address the respective ownership rights of the building owner and the LEC with respect to the embedded wiring. Issues to be evaluated include who owns wiring that the LEC no longer uses, the impact of existing ROE or other contractual provisions regarding ownership, and applicable requirements under federal or local law. CoServ Broadband urges the Commission, in making this evaluation, to recognize, to the greatest extent possible, that it should characterize inside wiring as the property of the building owner and not the LEC.

**MTP PREMISES OWNERS MUST BE OBLIGATED TO
PROVIDE OPEN ACCESS TO THEIR FACILITIES**

The Commission, in the NPRM, addresses whether premises owners also should be subjected to nondiscriminatory access requirements on their property. Generally, it solicits comment on "whether building owners who allow access to their premises to any provider of telecommunications services should make comparable access available to all such providers under nondiscriminatory rates, terms and conditions."¹⁶ If such access obligations are appropriate, the Commission inquires whether a national policy should be adopted preempting state requirements.¹⁷ Finally, the Commission asks for public input on "whether it is sound policy, and would promote competition, to permit exclusive contracts between property owners and service providers under some circumstances."¹⁸

¹⁶Id. at ¶ 53.

¹⁷Id. at ¶ 55.

¹⁸Id. at ¶ 61.

Enforcing non-discriminatory access requirements on premises owners clearly would stimulate competition.¹⁹ CoServ Broadband strongly opposes any Commission policy that would permit contracts granting a telecommunications provider the exclusive right to provide services in a MTP.

Allowing exclusive ROEs would retard development of a competitive marketplace for MTP access. Well-established CLECs and other companies would have the resources to renegotiate exclusive ROEs before emerging companies, like CoServ Broadband, have a chance to market their services. Moreover, the larger companies would have the potential to engage in predatory or other anti-competitive practices with respect to the terms and conditions offered to MTP owners.

The Commission must aggressively enforce such restrictions on exclusive ROEs. Preemption of all conflicting state or local laws is a necessity. Exemptions for smaller MTPs should not be adopted. Grandfathering of exclusive ROEs should be limited so the existence of such contracts does not indefinitely restrict MTP access by potential competitors.

A UNIFORM DEMARCATION POINT MUST BE ESTABLISHED

The demarcation point between the LEC's facilities and the building owner's facilities is the gateway for competitive carriers to provide tenant services. Thus, identification of the demarcation point and clarification of how other carriers can gain access to the MTP through this facility is an important factor in promoting the availability of competitive telecommunications services.

¹⁹Telecommunications Services Inside Wiring, CS Dkt. No. 95-184, Implementation of The Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, MM Dkt. No. 92-260, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, 3742 (1997), recon. pending, appeal docketed sub. nom. Charter Communications, Inc. v. FCC, No. 97-4120 (8th Cir. 1997).

Little has been done to establish appropriate standards for how the MTP demarcation point must be made available:

Under our current rules, the demarcation point in multiple unit premises may be established at any number of places depending on the date the inside wiring was installed, the local carrier's reasonable and nondiscriminatory practices, and the property owner's preferences.²⁰

CoServ Broadband recommends that the Commission put an end to the "floating" demarcation point. Such uncertainty handicaps competitive carriers because it imposes unnecessary additional burdens in designing the individual MTP infrastructure. Moreover, the lack of uniform requirements regarding the demarcation point makes it too easy for the incumbent carrier to impose unnecessary barriers to entry. No guarantees exist that the incumbent carrier's demarcation point would be configured or located so that the competitive carrier could offer all the services it wants to provide (e.g., Internet access).²¹ Absent uniform standards, there is no certainty that the demarcation point facilities would be maintained or upgraded consistent with the competitive carrier's requirements. Thus, as the Commission suggests, a "uniform demarcation point for purposes of competitive access, either at minimum point of entry or at some other point,"²² must be established.

CONCLUSION

CoServ Broadband applauds the Commission's efforts at opening up the MTP marketplace. This is the "last frontier" for competitive providers to penetrate, and the Commission's proposals advance their cause significantly.

²⁰NPRM at ¶ 65.

²¹Id. at ¶ 66.

²²Id. at ¶ 67.

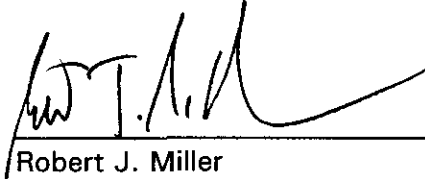
As detailed herein, to ensure that these efforts are successful, the Commission must adopt carefully crafted rules that:

- ◆ Require availability of cost-based UNEs
- ◆ Prohibit exclusive ROEs
- ◆ Establish uniform criteria for locating and operating demarcation point facilities.

Once these rules are implemented, CoServ Broadband and other carriers will have a more level playing field to market their services. MTP tenants will have a wide choice of competitively priced, innovative services. And, building owners will have a greater opportunity to increase their revenues.

Respectfully submitted,

DALLAS WIRELESS BROADBAND, L.P.,
dba COSERV BROADBAND



Robert J. Miller
GARDERE & WYNNE, L.L.P.
3000 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4761
Telephone: (214) 999-3000
Facsimile: (214) 999-4667

Dated: August 26, 1999

Its Attorneys